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No. 90-684

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLAWZELLE WIGGINS,

Petitioner,

v.

CHRYSLER CORPORATION; ACUSTAR, INC.; INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AND ITS LOCAL 1435,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT UAW'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit properly found that Petitioner's failure to exhaust internal union remedies would not be excused?

2. Whether, in a § 301 action a District Court properly denies a stay to a plaintiff who has failed to exhaust internal union remedies and such remedies have been time-barred under the internal procedures?

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RESPONDENT UAW'S BRIEF IN OPPOSITION

PRAYER

The Respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1435 respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's decision in this case. The decision is unreported.

STATEMENT OF THE CASE

Respondents accept the facts as stated by the District Court and affirmed by the Sixth Circuit. Petitioner's Statement of the Case is incomplete and argumentative.

Petitioner was hired by Chrysler on October 9, 1967, at its Perryburg, Ohio plant and was continuously employed by Chrysler and/or Acustar until August 29, 1986. During this entire period of time the terms and conditions of petitioner's employment were governed by Collective Bargaining Agreements between Chrysler and/or Acustar and the UAW.

Petitioner exhibited a pattern of attendance problems and related disciplinary action beginning shortly after hire. From November of 1968 until October of 1983, petitioner accumulated thirteen (13) warnings, seven (7) one day disciplinary layoffs, seven (7) three day disciplinary layoffs and four (4) five day disciplinary layoffs for his absenteeism. In June of 1984, petitioner was counseled about his excessive absenteeism pursuant to the disciplinary system under the contractual Uniform Attendance Procedure. In July of 1985 petitioner was counseled again under the same procedure.

Petitioner's continued absenteeism led to implementation of the Chronic Absentee Procedure. This procedure applied to "employees who avoid corrective discipline for absences by attributing them to frequent and recurring illnesses" whose "irregular attendance prevents them from fulfilling the purpose for which they were hired, that is, as full-time employees." Pursuant to this procedure petitioner was counseled on August 20, 1985 because his absentee rate was 23.9% for the six month period from December 31, 1984 through June 30, 1985, and warned that if his attendance did not improve significantly, he would be counseled again, disciplined or terminated. Petitioner objected to his inclusion in the Chronic Absentee Procedure, claiming that certain periods of absence should not be counted in the computation of his absentee rate and appealed to the contractually established Chrysler-UAW National Attendance Council to review his records to determine if any periods of absence could be excluded from computation of the

rate. In May of 1986, the National Attendance Council issued its decision finding that the disputed absences were to be included and, as such, that petitioner was properly placed in the Chronic Absentee Procedure. In August of 1986, petitioner's attendance was again evaluated for the six month period ending May 31, 1986 wherein it was determined that his rate of absenteeism had risen to 46.7%. Petitioner was discharged for this absenteeism on August 29, 1986.

UAW Local 1435 filed a grievance protesting petitioner's discharge seeking reinstatement without loss of seniority or pay. This grievance was processed through the National Attendance Council step of the grievance procedure. On April 1, 1988 the National Attendance Council issued its decision on the grievance offering petitioner reinstatement in accordance with his seniority but without back pay.[1] Petitioner refused reinstatement and, without once attempting the available internal union remedies, filed this suit on May 25, 1988.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THE SIXTH CIRCUIT PROPERLY FOUND, ON THE UNDISPUTED FACTS BEFORE IT, THAT PETITIONER'S FAILURE TO EXHAUST INTERNAL UNION REMEDIES WOULD NOT BE EXCUSED

In *Clayton v. Automobile Workers*, 451 U.S. 679 (1981), this Court held that courts have discretion whether to require exhaustion of internal union remedies and outlined three factors relevant to the exercise of that discretion—whether union officials are so hostile to the employee that a fair hearing could not be obtained; whether the internal procedure would be inadequate either to reactivate the employee's grievance or to award

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[3] Petitioner's statement that the National Attendance Council's decision would exclude the period of August 1986 to April 1988 from petitioner's seniority (Petition at p. 10) is simply wrong.

him the full relief he seeks under § 301; and whether exhaustion of internal procedures would unreasonably delay the opportunity to obtain a judicial hearing. In the present case the District Court followed *Clayton* and properly exercised its discretion in determining that petitioner was required to exhaust internal union remedies. The Sixth Circuit correctly affirmed that determination.

Both Courts below reviewed each and every reason proffered by petitioner to excuse his failure to exhaust internal union remedies. The relevant facts were undisputed. Petitioner was a recipient of the UAW publication *Solidarity*. The record contained many articles from *Solidarity* which outlined the internal appeals procedure in a clear and understandable manner. Additionally, petitioner had retained counsel either at the time he was informed of the offer for reinstatement or within a month thereafter. Counsel should be charged with the responsibility of ascertaining what internal remedies exist and with the knowledge that exhaustion of those internal remedies would be mandatory. Based on these undisputed facts, the Courts below properly rejected petitioner's proffered excuse of ignorance.

Contrary to petitioner's contention, the opinions below in no way conflict with the Second Circuit's holding in *Johnson v. General Motors*, 641 F.2d 1075 (2nd. Cir. 1981) (Initially, of course it must be noted that *Johnson* is pre-*Clayton* and its continued validity even within the Second Circuit is suspect, especially in light of cases such as *Wozniak v. Auto Workers Local 2266*, 842 F.2d 635 (2nd. Cir. 1988)). *Johnson* is fact specific and the facts before the *Johnson* Court are different from the facts in the present case. For example, *Johnson* dealt with the 1977 version of the UAW Constitution which is substantially different from the 1986 Constitution applicable to the present case; *Johnson* did not involve *any* evidence of *Solidarity* issues outlining the internal procedures and *Johnson* did not involve an attorney for the grievant

retained at an early stage as does this case. This Court has consistently refused to grant certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041 (1984); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 n.8 (1981); *United States v. Johnson*, 268 U.S. 220 (1925).

Petitioner merely disagrees with the decisions below and his disagreement does not give rise to any issue worthy of review.

II. IN A § 301 ACTION A DISTRICT COURT PROPERLY DENIES A STAY TO A PLAINTIFF WHO HAS FAILED TO EXHAUST INTERNAL UNION REMEDIES AND SUCH REMEDIES HAVE BEEN TIME-BARRED UNDER THE INTERNAL PROCEDURES

Petitioner correctly notes that there is no legal precedent to support his contention that a stay should be granted to allow union members an opportunity to pursue internal union remedies. Any stay order is directed to the sound discretion of the Court stemming from the Court's inherent power to control its own docket. See e.g. *Ohio Environmental Council v. U.S. District Court*, 565 F.2d 393 (6th Cir. 1977). Here, even if the District Court did stay the procedure, it would be to no avail because the time limit for filing an internal union appeal had long since passed. Further, granting a stay would totally undermine *Clayton* and its progeny. *Clayton* specifically rejected an analogy to the Landrum-Griffin Act and the policy of forestalling judicial interference with internal union affairs finding that instead the national labor policy encouraging private rather than judicial resolution of disputes over collective bargaining agreements was applicable to § 301 suits. That national policy would not be served by allowing petitioner to litigate his dispute in court for nearly a year before seeking a stay to allow instituting the union internal appeals which were available at the outset.

CONCLUSION

It is clear from the Petition that petitioner is merely asking this Court to re-evaluate all the evidence that was fairly and fully evaluated by the Courts below. The decision of the Sixth Circuit was correctly rendered in accordance with well settled principles of law. Petitioner raises no issue worthy of this Court's precious time. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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